



Preserving America's Heritage

December 12, 2016

Ester McCullough  
Vernal Field Office Manager  
Bureau of Land Management  
Vernal Field Office  
170 South 500 East  
Vernal, UT 84078

*Re: Review of "no adverse effect" finding  
Vernal Field Office Gas and Oil Lease Sales  
Uintah and Duchesne Counties, Utah*

Dear Ms. McCullough:

On November 10, 2016, the Advisory Council on Historic Preservation (ACHP) received the Bureau of Land Management's (BLM) request for dispute resolution and the supporting documentation regarding the finding of "no adverse effect" for the referenced undertaking on a property listed or eligible for listing in the National Register of Historic Places. We were invited to comment pursuant to our regulations, "Protection of Historic Properties" (36 CFR Part 800), and in particular the sections on disagreement with, and Council review of, findings at 36 CFR §800.5(c)(2) and (3). We have reviewed the information you provided, which included the objections from the Nine Mile Canyon Coalition, the Colorado Plateau Archaeological Alliance with the Southern Utah Wilderness Alliance (collectively CPAA), and the Hopi Tribe. Since receiving this request for dispute resolution, the BLM has continued consultation and as a result, has agreed to defer the gas and oil leases in question proposed for the Nine Mile Canyon, which is not only world renowned for its unique collection of petroglyphs and other prehistoric sites, but also home to historic ranches. We appreciate the agency's efforts to resolve the issues, but as objections to some parcel sales and the BLM's determination of effect regarding these sales remain, we provide the following advisory comments.

First, the BLM acknowledges that leasing is an undertaking and, as such, has initiated Section 106 consultation. We agree that this is an undertaking subject to review under Section 106. The BLM argues that "The act of leasing parcels will not have an adverse effect on historic properties." As we have stated in the past for similar undertakings, a leasing decision can narrow the "broad range of alternatives" available to avoid, minimize or mitigate any adverse effects that may result from activities carried out under the lease. The ACHP membership's comments in a recent Forest Service and BLM case, "Regarding the Release from Suspension of the Permit to Drill by Solenex LLC in Lewis and Clark National Forest, Montana," sent to the Secretary of

ADVISORY COUNCIL ON HISTORIC PRESERVATION

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Interior and Secretary of Agriculture on September 21, 2015, support this position. That comment stated in part:

For the Section 106 process to work effectively, the agency's consideration of a 'broad range of alternatives' must include avoidance alternatives, if they exist. ... For this reason, the ACHP urges agencies to develop policies and procedures that require the initiation of Section 106 consultation prior to leasing decisions.

Based on this position, the ACHP does not agree that, in all circumstances and regardless of location, leasing will not have an adverse effect on historic properties. The purpose of the lease is to give the lessee the right to use the leased land to explore for, drill for, extract, remove, and dispose of oil and gas deposits. Such actions, as acknowledged by the BLM, are a reasonably foreseeable consequence of leasing and therefore must be considered during this Section 106 review. When an agency is proposing lease sales in an area of known significant historic properties like Nine Mile Canyon, or in adjacent areas where the presence of high concentrations of historic properties is likely even if presently unknown, it is our position that the BLM cannot assume that leasing will have no adverse effect on historic properties. An adverse effect finding does not need to be predicated on certainty. The regulations at 36 CFR §800.4(d)(2) "If the agency official finds that there are historic properties which may be affected by the undertaking, the agency official shall notify all consulting parties, including Indian tribes or Native Hawaiian organizations, invite their views on the effects and assess adverse effects, if any, in accordance with § 800.5" (emphasis added). While we are not familiar with the nearby Argyle Canyon, the CPAA presents information about similar concentrations of historic properties there (and in their letter to the BLM dated December 8, about potential historic properties in other nearby parcels) that may need to be identified and potential effects considered prior to the issuance of any lease.

We appreciate that the BLM plan was to lease certain parcels in Nine Mile Canyon with a No Surface Occupancy stipulation. However, the BLM has asserted that there is no guarantee that these leases will not be accessed from private land. By acknowledging that the lessee may want to access the minerals from private land in the canyon, it logically follows that there is the potential for adverse effects of this reasonably foreseeable event. In this situation, we would argue that there is a reasonable probability for the lease to result in adverse effects on historic properties (as outlined in some of the consulting parties' submissions), including those that could arise from the use of pads for directional drilling from private lands in the bottom of the canyon, such as increased traffic and noise.

In specific localities with a special sensitivity to direct, indirect, and cumulative effects, like the world class resources in this area of Utah, the most appropriate way to address such potential adverse effects would be to develop a programmatic agreement (PA) that would guide consideration of historic properties in lease development and issuance.

Finally, we would like to point out the importance of following the sequential steps in the Section 106 consultation process in undertakings like this. The BLM sent the finding of "no adverse effect" to the State Historic Preservation Officer and consulting parties prior to actually consulting with the consulting parties. The regulations call for the BLM to "seek information, as appropriate, from consulting parties, and other individuals and organizations likely to have

knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking's potential effects on historic properties" in reaching its finding of no adverse effect, not after (see 36 CFR §800.4(a)(3)). In addition, after submitting the information to the ACHP for dispute resolution, the BLM neglected to "concurrently notify all consulting parties that such a submission has been made" as called for in the regulations at 36 CFR §800.5(c)(2)(i). Given the high level of interest by consulting parties in the numerous historic properties in Nine Mile Canyon and on-going consultation related to the West Tavaputs Programmatic Agreement, it is particularly important that BLM follow the procedural steps in order to ensure its decisions have been reached in consultation with the consulting parties.

In conclusion, the ACHP does not agree with BLM's finding of "no adverse effect" for the proposed lease sales in this recognized and sensitive area with an abundance of historic properties. While we appreciate that the BLM has deferred the lease sales in Nine Mile Canyon, because of the potential to adversely affect historic properties in direct, indirect, and cumulative ways, we continue to believe a finding of adverse effects for those particular leases is appropriate and encourage the BLM to consult on a PA prior to their sale. We understand the scheduling issues this may cause and will work with you to expedite the consultation process to the degree possible. Working with you to establish a PA in this particular circumstance will position us to better understand the issues and challenges of leasing, and allow us all to consider other compliance mechanisms that may be effective to deal with leases in the future.

The ACHP's opinion is advisory in this case and the BLM must take it into account in making a final decision. According to the regulations (at 36 CFR § 800.5(c)(3)(ii)(B)),

If the agency official's initial finding [of no adverse effect] will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial finding of no adverse effect, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 [for this undertaking] are fulfilled.

Thank you for the opportunity to comment on this dispute regarding effects to historic properties. If you have any questions or require further assistance of the ACHP, please contact Nancy J. Brown, ACHP's liaison to the BLM, at 202-517-0209 or by e-mail at nbrown@achp.gov.

Sincerely,



Reid J. Nelson  
Director  
Office of Federal Agency Programs  
Advisory Council on Historic Preservation